

**THOMAS G. NUTT**  
Claimant

**FARMCO, INC.**  
Respondent

**FARMLAND INSURANCE CO.**  
Insurance Carrier

The claimant was employed by the respondent on April 15, 2000. The claimant testified that on May 15, 2000, he was using a vacuum machine to transfer wheat from a grain bin onto a truck. He testified the opening in the bin was two feet by two feet.

approximately four feet above ground level and he was in and out of the bin approximately 20 times that day.

The claimant described the method he used to enter and exit the bin as requiring him to place a leg in the opening and then bend over and place his upper torso through the opening. The claimant alleged injury to his back from the repeated process of climbing in and out of the grain bin. At preliminary hearing the claimant stated he felt a pop in his back but noted that initially there was no pain associated with the incident. However, the claimant noted with the passage of time he developed gradually worsening pain which started to radiate into his leg.

At his deposition taken approximately one month before the preliminary hearing, the claimant testified he became aware that an injury had occurred on May 15, 2000, because he felt a pain in his back and down his right leg. This testimony indicates an immediate onset of radicular pain into the leg. Moreover, the claimant thought the pain was in his right leg.

The claimant's supervisor, Larry Graham, testified he had told claimant to stay outside the bin because claimant needed to watch the vacuum machinery. Although the supervisor was not always present at the bin, he testified that when he was, he never observed claimant getting in or out of the bin. The claimant neither reported the incident to his supervisor nor sought medical treatment on May 15, 2000.

On June 7, 2000, the claimant sought treatment with his family physician, Dr. Moser. The claimant was seen by a physician's assistant and the contemporaneous medical record of that visit indicates claimant was complaining of increased lower back pain. The record further noted claimant had problems with chronic low back pain, had previously undergone a lumbar laminectomy and discectomy and was taking Hydrocodone. The record does not contain any mention of a work-related incident or injury. The claimant admitted he had advised the doctor's office it was not job related but did so in order for his insurance to take care of it and to protect his job.

The claimant had a prior low back surgery in 1994. In 1997 claimant had a work-related injury for a different employer when he fell 60 feet into a grain bin suffering multiple injuries. The claimant had sustained a fractured vertebra, lacerations, fractured ribs and had a portion of his cervical spine fused. The claimant testified he was taking Hydrocodone for his back pain before he was employed by the respondent.

Dr. Moser referred the claimant to Dr. Knudsen. At claimant's initial visit with Dr. Knudsen on June 23, 2000, the medical record noted claimant had been doing well until a month and a half ago when, without any inciting event, claimant developed intense pain down his left leg to his left foot. The claimant testified he told Dr. Knudsen he injured his back climbing in and out of the grain bin.

Leila Becker, the respondent's employee responsible for processing workers compensation claims, testified she became aware claimant alleged he was injured from crawling in and out of a bin and so she had claimant fill out the respondent's workmen's compensation claimant's report form. Ms. Becker could not recall when she became aware claimant was alleging a work-related injury but noted she would typically give an employee the form to fill out as soon as she was aware of the allegations.

The claimant filled out the respondent's workmen's compensation claimant's report form on June 27, 2000. The claimant filled in the form describing his injuries as constant pain in his left leg and noted the injury occurred climbing in and out of a grain bin.

Dr. Knudsen treated claimant with lumbar epidural steroid injections which only provided short-term relief. Dr. Moser then referred the claimant to Dr. Coester for a neurosurgical evaluation. Ultimately, Dr. Coester performed a left-sided L4-5 semi-hemilaminectomy and discectomy.

#### CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.<sup>1</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>2</sup>

The claimant's testimony contained inconsistencies regarding the onset of his symptoms. The claimant testified there was a pop in his back with no associated pain. When deposed the claimant testified he had an immediate onset of back and leg pain. The claimant testified at his deposition that he thought the onset of leg pain was in his right leg, however, the medical records note left leg pain. Claimant additionally admitted he was already taking pain medication for his back prior to his alleged accident. Lastly, the claimant admitted he completed a form at Dr. Moser's office in which he denied a work-related injury.

It is disingenuous for claimant to argue that he knew his injury was work-related when he incorrectly filled out the forms at Dr. Moser's office and then to argue he had just cause for failing to provide timely notice of the accident because he was unaware he had

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<sup>1</sup>K.S.A. 44-510(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

<sup>2</sup>K.S.A. 44-508(g). *See also* In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

sustained a work-related accident until his condition worsened and necessitated the referral to Dr. Knudsen.

The contemporaneous medical records from Drs. Moser and Knudsen contain no mention of the alleged incident crawling in and out of the grain bin. It is significant that Dr. Knudsen's record of claimant's initial visit specifically noted claimant developed an onset of pain without any inciting event.

The Administrative Law Judge observed the claimant testify and concluded he had failed to meet his burden of proof that he sustained an accidental injury arising out of and in the course of his employment. Credibility is a significant factor in this case and the Judge had the opportunity to observe claimant testify. The Judge must have found claimant's testimony untrustworthy as the Judge denied claimant benefits. In this instance, the Board gives some deference to the Judge's determination that claimant's testimony was not persuasive. Therefore, for all of the above reasons, the Board also finds claimant failed to meet his burden of proof that he sustained an accidental injury arising out of and in the course of his employment.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>3</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated July 3, 2001, is affirmed.

**IT IS SO ORDERED.**

Dated this 28th day of September 2001.

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BOARD MEMBER

c: Henry A. Goertz, Attorney for Claimant  
Jeffrey E. King, Attorney for Respondent and Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

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<sup>3</sup> K.S.A. 1999 Supp. 44-534a(a)(2).